

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

KBR INC. dba RUSH CURTIS & ASSOC.,

Plaintiff,

vs.

JAMES LAMPKIN,

Defendant.

Case No: C 11-01514 SBA

**ORDER GRANTING CROSS-  
DEFENDANT'S UNOPPOSED  
MOTION TO DISMISS AND  
REMANDING ACTION**

Dkt. 5

JAMES LAMPKIN,

Cross-Complainant,

vs.

VALLEY SKILLED NURSING CENTER,  
INC.; THE OPERATING ENGINEERS  
PUBLIC AND MISCELLANEOUS  
EMPLOYEES HEALTH AND WELFARE  
FUND,

Cross-Defendants.

The parties are presently before the Court on Cross-Defendant Operating Engineers Public and Miscellaneous Employees Health and Welfare Fund's ("Trust Fund") Motion to Dismiss Cross-Complainant James Lampkin's First Amended Cross-Complaint. Dkt. 5. Trust Fund noticed its motion for July 12, 2011. Under the version of Local Rule 7-3 in effect at the time the motion was filed, any opposition or statement of non-opposition had to be filed by no later than June 21, 2011, which is twenty-one days before the noticed hearing date. To date, no opposition has been filed by Cross-Complainant, who is represented by counsel. The Court's Standing Orders explicitly warn that: "The failure of

1 the opposing party to timely file a memorandum of points and authorities in opposition to  
2 any motion or request shall constitute a consent to the granting of the motion.” Dkt. 13 at  
3 5.

4 **I. DISCUSSION**

5 **A. DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(B)**

6 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an  
7 action for failure to comply with any order of the court.” Ferdik v. Bonzelet 963 F.2d  
8 1258, 1260 (9th Cir. 1992). As such, the failure to file an opposition to a motion to dismiss  
9 in the manner prescribed by the Court’s Local Rules is grounds for dismissal. Ghazali v.  
10 Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam). “In determining whether to dismiss a  
11 claim for failure to prosecute or failure to comply with a court order, the Court must weigh  
12 the following factors: (1) the public’s interest in expeditious resolution of litigation; (2) the  
13 court’s need to manage its docket; (3) the risk of prejudice to defendants/respondents;  
14 (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition  
15 of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002).

16 In the instant case, the Court finds that the above-referenced factors weigh in favor  
17 of dismissal. With regard to the first factor, “[t]he public’s interest in expeditious  
18 resolution of litigation always favors dismissal.” Yourish v. Cal. Amplifier, 191 F.3d 983,  
19 990 (9th Cir. 1999). This is particularly true in the instant case, where Cross-Complainant  
20 has impeded the Court’s ability to move this case forward by failing to respond to Trust  
21 Fund’s motion to dismiss and failing to comply with the requirements of the Court’s  
22 scheduling orders.

23 The second factor also militates in favor of dismissal. See Pagtalunan, 291 F.3d at  
24 642 (“It is incumbent upon the Court to manage its docket without being subject to routine  
25 noncompliance of litigants”); Yourish, 191 F.3d 983, 990 (9th Cir. 1999) (recognizing  
26 court’s need to control its own docket); see also Ferdik, 963 F.2d at 1261 (non-compliance  
27 with a court’s order diverts “valuable time that [the court] could have devoted to other  
28 major and serious criminal and civil cases on its docket.”).

1 The third factor, the risk of prejudice to the moving party, generally requires that “a  
2 defendant ... establish that plaintiff’s actions impaired defendant’s ability to proceed to trial  
3 or threatened to interfere with the rightful decision of the case.” Pagtalunan, 291 F.3d at,  
4 642. At the same time, the Ninth Circuit has “related the risk of prejudice to the plaintiff’s  
5 reason for defaulting.” Id. Here, Cross-Complainant has offered no explanation for his  
6 failure to respond nor is any apparent from the record. Indeed, Cross-Complainant has had  
7 over two months to prepare his opposition. These facts also weigh strongly in favor of  
8 dismissal. See Yourish, 191 F.3d at 991; Ghazali, 46 F.3d. at 54.

9 As to the fourth factor, the Court has already considered less drastic alternatives to  
10 dismissal. As noted, the Court’s Standing Orders warn that as a consequence of a party’s  
11 failure to oppose a motion, the Court will construe such inaction as a consent to the  
12 granting of the unopposed motion. “[A] district court’s warning to a party that failure to  
13 obey the court’s order will result in dismissal can satisfy the ‘consideration of [less drastic  
14 sanctions]’ requirement.” Ferdik, 963 F.2d at 1262.

15 The final factor, which favors disposition of cases on the merits, by definition,  
16 weighs against dismissal. Pagtalunan, 291 F.3d at 643 (“Public policy favors disposition of  
17 cases on the merits. Thus, this factor weighs against dismissal.”).

18 In sum, the Court concludes that four of the five relevant factors weigh strongly in  
19 favor of granting Defendant’s unopposed motion and dismissing the Cross-Complaint as to  
20 Trust Fund. Id. (affirming dismissal where three factors favored dismissal, while two  
21 factors weighed against dismissal).

## 22 **B. SUPPLEMENTAL JURISDICTION**

23 When the federal claim that served as the basis for removal is eliminated, either  
24 through dismissal by the court or by amendment of the pleadings, federal courts may  
25 decline to assert supplemental jurisdiction over the remaining state law causes of action and  
26 exercise its discretion to remand them to state court. See 28 U.S.C. § 1367(c)(3); Acri v.  
27 Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (court may sua sponte exercise  
28 discretion and dismiss state law claims under 28 U.S.C. § 1367(c)). Here, Trust Fund

1 removed the action on the ground that the claims alleged against it arise under section 502  
2 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132. See  
3 Notice of Removal ¶ 13. Since the Court is dismissing the Cross-Complaint as to Trust  
4 Fund, there no longer are any claims arising under federal law involved in this action.  
5 Given the lack of any federal claims, coupled with the stage of the litigation, the Court  
6 exercises its discretion and remands the action to state court from which it was removed.  
7 Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351(1988) ("When the single federal-law  
8 claim in the action was eliminated at an early stage of the litigation, the District Court had a  
9 powerful reason to choose not to continue to exercise jurisdiction."); Harrell v. 20th  
10 Century Ins. Co., 934 F.2d 203, 205 (9th Cir. 1991) ("it is generally preferable for a district  
11 court to remand remaining pendant claims to state court.")

## 12 **II. CONCLUSION**

13 For the reasons set forth above,

14 IT IS HEREBY ORDERED THAT

15 1. Trust Funds' unopposed motion to dismiss the Cross-Complaint is  
16 GRANTED.

17 2 The Court exercises its discretion under 28 U.S.C. § 1367(c) and REMANDS  
18 the instant action to the County of Mendocino. The Clerk shall close the file and terminate  
19 all pending matters and deadlines. The hearing scheduled for July 12, 2011, is VACATED.

20 IT IS SO ORDERED.

21 Dated: June 29, 2011

  
22 SAUNDRA BROWN ARMSSTRONG  
23 United States District Judge  
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